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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 254.

SECURITIES AND EXCHANGE COMMISSION, *Petitioner*,

v.

CHENERY CORPORATION, H. M. ERSKINE, R. H. NEILSON, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENTS CHENERY CORPORATION, H. M. ERSKINE, R. H. NEILSON, ET AL.

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TABLE OF CONTENTS.

	Page
Opinion below	1
Jurisdiction	2
Statement of case	2
Summary of argument	10
Argument	12
I. No rule of common law or equity prohibited the purchase of stock by the respondents	12
A. The prevailing doctrine in the courts imposes no legal or equitable restriction on purchases by an officer or director from a shareholder	12
B. The same rule obtains in suits by minority stockholders for the benefit of the corporation	14
C. The only dissent from the prevailing doctrine has been directed toward its failure to impose a duty of disclosure on the director	15
D. Respondents have withheld no information which should have been disclosed	17
II. Neither Section 7 nor Section 11 of the Public Utility Holding Company Act of 1935 empowers the Commission to require the respondents to surrender stock purchased by them while reorganization proceedings were pending	17
III. Section 17 of the Public Utility Holding Company Act of 1935 recognizes the right of respondents to purchase stock	20
IV. The authorities cited on behalf of the Commission do not support a restriction of the right of respondents to purchase stock	24
V. The Commission has attempted to invade the legislative field	27
Conclusion	31
Appendix	32

INDEX OF AUTHORITIES.

Cases.	Page
American United Mutual Life Insurance Co. v. *City of Avon Park*, 311 U. S. 138 (1940)	25
Anchor Realty & Investment Co. v. *Rafferty*, 308 Ill. App. 484, 32 N. E. (2d) 394 (1941)	13
Bawden v. *Taylor*, 254 Ill. 464, 98 N. E. 941 (1912)	12, 13
Bisbee v. *Midland Linseed Products Company*, 79 F. (2d) 24 (C. C. A. 8th, 1927), cert. den. 275 U. S. 564 (1927)	14
Blabon v. *Hay*, 269 Mass. 401, 169 N. E. 268 (1929)	12
Cahall v. *Lofland*, 12 Del. Ch. 299, 114 Atl. 224 (1921)	12
Carpenter v. *Danforth*, 52 Barb. 581 (N. Y. 1868)	12
Crowell v. *Jackson*, 53 N. J. L. 656, 23 Atl. 426 (1891)	12
Du Pont v. *Du Pont*, 242 Fed. 98 (D. Del. 1917) 256 Fed. 129 (C. C. A. 3rd 1919) cert. den. 250 U. S. 642 (1919)	12
Dutton v. *Barnes*, 162 Minn. 430, 203 N. W. 414 (1925)	12
Erie Railroad v. *Tompkins*, 304 U. S. 64 (1938)	18
Fischer v. *Guaranty Trust Co.*, 259 App. Div. 176, 18 N. Y. S. (2nd) 328 (1940)	16
Havender v. *Federal United Corp.*, 11 A. (2d) 331 (Del. 1940)	3
In re McCrory Stores Corporation, 12 F. Supp. 267 (S. D. N. Y. 1935)	26
In re Mountain States Power Co., 35 F. Supp. 307 (D. Del. 1940)	26
In re Norcor Manufacturing Co., 109 F. (2d) 407 (C. C. A. 7th 1940)	26
In re Paramount-Publix Corporation, 12 F. Supp. 823 (S. D. N. Y. 1935)	26
In re Republic Gas Corporation, 35 F. Supp. 300 (S. D. N. Y. 1936)	26
Klerlein v. *Werner*, 307 Pa. 16, 160 Atl. 719 (1932)	12
Kroger v. *Jaburg*, 231 App. Div. 641, 241 N. Y. S. 387 (1931)	26
Lum v. *McEwen*, 56 Minn. 278, 57 N. W. 662 (1894)	26
Miner v. *Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218 (1892)	26
Oliver v. *Oliver*, 118 Ga. 362, 45 S. E. 232 (1903)	16
Otis & Co. v. *Insurance Building Corporation*, 110 F. (2d) 333 (C. C. A. 1st 1940)	26
Pepper v. *Litton*, 308 U. S. 295 (1939)	25

Page

Percival v. *Wright*, (1902) 2 Ch. 421 12
Seitz v. *Frey*, 152 Minn. 170, 188 N. W. 266 (1922) 13
Stewart v. *Harris*, 69 Kans. 498, 77 Pac. 277 (1904) 16
Strong v. *Repide*, 213 U. S. 419 (1909) 16
Taylor v. *Standard Gas & Electric Co.*, 306 U. S. 307 (1939) 26
Tower Hill-Connellsville Coke Co. v. *Piedmont Coal Co.*, 64 F. (2d) 817 (C. C. A. 4th, 1933) cert. den. 290 U. S. 675 26
United States v. *Buckner*, 108 F. (2d) 921, cert. den. 309 U. S. 669 26
Walsh v. *Goulden*, 130 Mich. 531, 90 N. W. 406 (1902) .. 12
Wardell v. *Railroad Co.*, 103 U. S. 651 26
Woods v. *City National Bank and Trust Company*, 312 U. S. 262 (1941) 25

STATUTES.

Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. Sec. 79:
Sec. 6 32
Sec. 7 ..... 2, 17, 32
Sec. 11 ..... 18, 33
Sec. 17 ..... 20, 21, 27, 34
Securities and Exchange Act of 1934, 48 Stat. 896, 15 U. S. C. Sec. 78(p) 20
Delaware Corporation Law 2

ARTICLES, TEXTS AND OTHER AUTHORITIES.

Crawford on Statutory Construction (1940) 23
Fletcher on Corporations 12, 13
MacChesney and O'Brien, *Full Disclosure under the Securities Act*, 4 Law and Contemporary Problems 143 (1937) 21
MacChesney, *Further Developments in 'Disclosure' Under the Securities Act*, 33 Ill. L. Rev. 145 (1939) 21
Thompson on Corporations 12
Tracy and MacChesney, *The Securities Exchange Act of 1934*, 32 Mich. L. Rev. 1025 (1934) 20

Page

Yourd, *Trading in Securities by Directors, Officers and Stockholders: Section 16 of the Securities Exchange Act*, 38 Mich. L. Rev. 133 (1939) 21, 23
Note, 39 Columbia Law Review 219 (1939) 25
Note, 54 Harvard Law Review (1941) 29
Note, 83 U. of Pennsylvania Law Review 56 (1939) 29
Annotation, 84 A. L. R. 615 (1933) 12
13 American Jurisprudence 962 12
SEC, *Report on Proposals for Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934*, August 7, 1941 23
Senate Report No. 792, 73rd Congress 21
Senate Report No. 1455, 73rd Congress, 2nd Session.. 22
Senate Report No. 621, 74th Congress 22

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OPINION BELOW.

The opinion of the Court of Appeals (R. 139-155) is reported in 128 F. (2d) 303. The findings and opinion of the Commission (R. 63-79, 115-132) are reported in 8 S. E. C. 893. The supplemental findings and opinion of the Commission (R. 104-113) and the report of the Commission on a plan of reorganization (R. 97-104) are reported in S. E. C. Holding Company Act Release No. 3023.

JURISDICTION.

The judgment of the Court of Appeals was entered April 27, 1942 (R. 155). The petition for a writ of certiorari was filed July 25, 1942, and was granted October 13, 1942 (R. 159). This Court appears to have jurisdiction under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935.

STATEMENT OF CASE.

Federal Water Service Corporation (hereinafter called Federal), a Delaware corporation, was a holding company owning securities of subsidiaries which operated water, gas, electric and other properties. November 8, 1937, Federal registered with the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935, and filed with the Commission, under Section 7 of said act and the rules of the Commission, an application for a report on a plan of reorganization, and declarations regarding the alteration of rights of holders of outstanding securities and the solicitation of consents. The application and declarations set forth a plan for the voluntary reorganization of Federal, to be accomplished by amendment to its certificate of incorporation pursuant to Section 26 of the Delaware Corporation Law, and by a reduction in its capital pursuant to Section 28 of the Delaware Corporation Law. At the time of the filing of the application and declarations, Federal had outstanding six classes or series of stock: $7, $6.50, $6, $4 series preferred stock, Class A stock and Class B stock. Dividends in arrears had accumulated on all series of preferred stock and upon the Class A stock. Federal had valuable assets and had substantial annual net income, but, by reason of earlier losses and depreciation in the value of investments, the corporation had a capital deficit which

under Delaware law prevented the payment of dividends. The plan contemplated the simplification of the corporate structure and the elimination of the capital deficit by a reduction of capital, so that the corporation might resume the payment of dividends. (R. 18, 19, 63-67.)

The Commission objected to the plan first proposed, new plans were filed, and continued discussions were had with representatives of the Commission toward the development of a plan which the Commission would permit to become effective under the Public Utility Holding Company Act of 1935, which would comply with the law of Delaware as to the rights of holders of preferred stock to arrears of dividends, and which would also command the necessary consent of the stockholders of Federal as required by Delaware law. After the decision on January 16, 1940, in *Havender v. Federal United Corporation*, 11 A. (2d) 331, which established that under Delaware law preferred stock together with dividends in arrears thereon might be converted into new securities through a merger, Federal filed with the Commission on March 30, 1940, amendments to its application and declarations, setting forth a new plan of reorganization by way of merger. The amendments proposed the merger into Federal of two other Delaware corporations, Utility Operators Company and Federal Water and Gas Corporation. Utility Operators Company, the stock of which was largely owned by officers and employees of Federal and its subsidiary companies, owned all of the Class B stock of Federal. Federal owned all of the stock of Federal Water and Gas Corporation. Utility Operators Company and Federal Water and Gas Corporation also filed with the Commission declarations regarding the alteration of the rights of the holders of their securities in accordance with the proposed merger agreement. (R. 63, 64, 67)

During the period from November 8, 1937, to June 30, 1940, the respondents purchased preferred stock in Federal in amounts as follows:

Name	Shares $6.00 Preferred	$6.50 Preferred	$7.00 Preferred
Chenery Corporation	3860	3547	1211
H. M. Erskine	25	50	——
R. H. Neilson	10	——	——
W. A. Culin	50	110	——
F. T. Tansill	——	65	——
H. D. McHenry	——	75	15
T. H. Wiggin	50	30	——
C. M. Chenery	150	170	——
J. N. Greene	45	——	——
H. G. Calder	——	40	——
C. P. Rather	110	310	——
Wm. E. Matthews, III	——	65	——
C. van den Berg, Jr.	25	1535	140
W. R. Edwards	100	——	——
Watson Dark	5	160	60
E. C. Deal	85	——	——
F. R. Harris	130	173	40
E. C. Elliott	27	——	——
Total purchased by respondents	4672	6330	1466

A comparison of these purchases with the total stock transferred during the period and the total stock outstanding in each class is:

	$6.00 Preferred	$6.50 Preferred	$7.00 Preferred
Total outstanding	71,706	69,888	15,296
Transfers during period from January 1, 1938, to June 30, 1940*	69,578	61,595	12,919
Purchased by respondents during period from November 8, 1937, to June 30, 1940	4,672	6,633	1,466

* This does not include transfers from November 8, 1937, to December 31, 1937, inclusive, since the evidence only gave that year as a whole. It is an interesting coincidence that during the period in question an amount of stock changed hands which was approximately equal to the total amount outstanding. Petitioners purchased something less than 9 per cent of the stock sold.

The only sales of this stock by respondents during the period were: C. M. Chenery sold 125 shares of the $6.00 preferred stock and 20 shares of the $6.50 preferred stock, and C. van den Berg, Jr., sold 25 shares of the $6.00 preferred stock and 700 shares of the $6.50 preferred stock. (R. 56-61, 65)*

When these purchases were made the respondents other than Chenery Corporation were officers or directors of Federal or of Utility Operators Company. Chenery Corporation was a family holding company which had nine stockholders, of whom two, who owned approximately 47 per cent of the stock of Chenery Corporation, were officers or directors of Federal or Utility Operators Company. All of these purchases and sales of stock in Federal were currently reported to the Commission by the purchasers as required by Section 17 of the Public Utility Holding Company Act of 1935. (R. 13, 56-61)

June 29, 1940, the Commission issued tentative findings in which the question was raised for the first time whether the preferred stock which had been purchased by officers and directors of Federal and Utility Operators Company and by Chenery Corporation while plans of reorganization were pending before the Commission should be treated on any different basis than other preferred stock. (R. 10, 23.) Hearings were had on this question, and C. T. Chenery, the President of Federal, testified that he had advised the purchases of preferred stock of Federal by the Chenery Corporation and by the individual officers and directors, because he believed that the preferred stock was a very good investment, and because by its purchase the management could maintain a voting interest if the B stock should be eliminated. The testimony also showed that full information in regard to the corporation had always been given to the stockholders and to the public. (R. 24, 27, 28)

* In the brief for the Commission counsel repeatedly state that respondents were "trading" in Federal stock. This is hardly accurate. Respondents were purchasing for investment. Their sales were negligible.

The successive plans for reorganization as filed from time to time with the Commission were available to the public, including all stockholders, as were all financial reports filed with the Commission. (R. 17, 22) Mr. Culin, the treasurer of Federal, testified that the management had always been very free in giving information to everyone who asked for it. (R. 27) Annual reports of the company gave full information, quarterly earning statements were published in the financial pages of the newspapers, the newspapers carried reports of the plans before the Commission from time to time, and various investment houses also gave information and advice with respect to the stock. (R. 28)

Mr. Chenery testified:

> "* * * my feeling has been that if there is one corporation that has ever operated in the full blare of publicity, that this one is it. It was one of the first corporations to start and give full and complete details of every transaction. Standard Statistics has given reports at three-month intervals. There have been a dozen brokerage houses which have circularized preferred stockholders consistently, telling them of every development and plan and advising them what to do. Our own policy has been not to refuse any stockholder any information at any time. There is no record since we have been in control of the company since March 14, 1932, of our having refused any stockholder any information on any subject." (R. 32)

Stock of Federal was sold in the over-the-counter market, and its quotations appeared daily in New York newspapers. All of the purchases in questions were made in the open market, except in one instance when Chenery Corporation acquired 2700 shares of 6½ per cent preferred from the investment house of Ingalls & Snyder in exchange for $100,000 principal amount of Federal debentures. (R. 15) Mr. Ingalls testified that his firm had full knowledge of the facts relating to Federal, and that

> "* * * today I am very much delighted we made the trade. * * * it's been a most satisfactory trade." (R. 36)

Mr. Ingalls also testified that he knew that officers and directors of Federal had been purchasing the preferred stock during the three or four years before he sold his stock. (R. 37)

March 24, 1941, the Commission filed formal findings and an opinion in the proceeding. The plan then under consideration had contemplated the conversion of the four classes of preferred into new common stock. The Commission stated that the plan could not be approved in so far as it provided for participation of the preferred shares purchased by officers or directors of Federal or Utility Operators Company, or by the Chenery Corporation, after November 8, 1937, on a parity with other shares of preferred stock of the same class. (R. 71-79) The Commission held that the officers and directors were "trustees" who had purchased trust property, that they must account for any profit on such purchases and that

> "... honesty, full disclosure and purchase at a fair price do not take the case out of the rule." (R. 73)

Entry of an order was deferred, and it was stated that further consideration would be given to the matter if Federal filed amendments to its proposed plan designed to cure this and other alleged defects therein. (R. 79)

Thereafter amendments to the declarations and applications were filed by the corporations, in order to present a plan which complied with the findings and opinion of the Commission. The proposed merger agreement was amended to provide among other things that no shares of common stock of the surviving corporation should be issued for the shares of preferred stock of Federal purchased since November 8, 1937, by Chenery Corporation or by the individual petitioners when they were officers or directors of Federal or of Utility Operators Company, but that each such purchaser should receive upon surrender of such stock to the surviving corporation the cost of such stock with interest at 4 per cent per annum from the dates of its

purchase to the effective date of the merger agreement. It was further provided in effect that the respondents should account to the surviving corporation for any profit realized on any such stock as had been sold by them. (R. 79-85)

August 15, 1941, the respondents filed an application for leave to intervene in the proceedings before the Commission, and objected to the approval of any plan of reorganization containing a provision to the effect that the preferred stock purchased by the respondents should be treated on a less favorable basis than other preferred stock of the same class. (R. 85) August 18, 1941, the respondents were given permission to intervene and were made parties to the proceeding with leave to file a brief. (R. 96)

September 24, 1941, the Commission made a report on the amended plan of reorganization, entered supplemental findings and opinion, and issued an order permitting the declarations, as amended in conformity with the Commission's opinion of March 24, 1941, to become effective, and granting the applications as amended. The effect of this order was to deny the prayers contained in the intervening petition and brief of the respondents. (R. 105, 108)*

Upon appeal by the respondents, this order was reversed by the United States Court of Appeals for the District of Columbia. (R. 139) The Court stated in regard to the purchases,

> "The Commission's brief and argument in this court explicitly declare that the conclusion to outlaw this stock is not 'predicated on any finding that petitioners** defrauded or failed to make the fullest disclosure to the stockholders from whom they purchased the shares in question.' On the contrary, the Commission, very properly, admits that the transactions complained of were consummated without 'any ulterior purpose' and

* As stated by the Court of Appeals (R. 143), this order was entered under Section 7. This is clear from the terms of the order. (R. 108)

** Respondents in this Court.

equally without any intention to profit personally 'in the consummation of the plan through having traded while the proceeedings were pending'. We have, therefore, a case in which the facts are agreed, the good faith of petitioners admitted,* and the decision based squarely on the assumption that the purchase of securities of a corporation by its officers or directors for their own account, pending action on an application for approval of a merger, is 'detrimental to the public interest' as that phrase is used in Section 7(d)(6) of the Act." (R. 142)

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* Counsel for the Commission apparently take a different attitude in this Court. For the first time, by the use of such expressions as "self-imposed limitations" and "the prejudice to security holders if antagonistic trading interests of the management should lead it to delay the presentation of an adequate plan" (Brief pp. 8 and 33), they now apparently seek to give the impression that respondents purposely delayed the submission of a satisfactory plan pending purchase of stock. There is no factual basis for such a theory, and it is pertinent to note that such a theory is nowhere asserted or suggested in the original or supplemental findings of the Commission, 8 S. E. C. 893, (R. 63-79, 104), nor in its report on the plan (R. 97), nor in the petition for certiorari, nor in the Commission's statement of the "question presented" for decision by this Court.

The brief now indicates that the Commission's staff at all times opposed any participation by the Class B stock (Brief pp. 13-14, 19). This is not supported by the record. If this Court is to look at the unprinted record, to which many references have been made in the Commission's present brief, the story of the successive plans and the discussions with the staff thereon, will be found beginning at Tr. 2731. As late as May 11, 1939, when the third plan was presented (Tr. 2744) the company was informed by the staff that the Commissioners had discussed the plan and that it appeared sufficiently meritorious to make its filing appropriate (Tr. 2744-6).

The position of the company throughout was that it could not put through a voluntary plan of reorganization without the consent of the Class B stock, and that it was not unfair or inequitable to recognize the voting power of the Class B stock in some small way, as that stock was being asked to consent to a modification of its contractual rights. The company also considered that the Class A stock should have been accorded a larger participation than that finally given it, and this point was always a subject of discussion, ending with a dissent by one Commissioner who considered that the Class A stock should not participate at all. Difficulties presented by the Delaware law also delayed the formulation of the plan finally approved. The novelty of the questions and changes in membership of the Commission and its staff also contributed to delay.

The Court said further:

> "* * * it is admitted that there was a full and free disclosure before any purchases were made, the exercise of the utmost good faith throughout, * * *" (R. 146)
>
> "* * * And yet the Commission proposes to annul, not transactions growing out of an abuse of inside information, but transactions as to which both buyer and seller were equally informed of the facts—not trading designed to take quick profits from short term market fluctuations, but trading for investment by one whose income depended at least in part upon the success of the corporation of which he was an officer." (R. 149)

The Court of Appeals held that no statute, regulation, or rule of common law or equity proscribed such purchases of stock (R. 143), that Congress in enacting the Public Utility Holding Company Act of 1935 had never intended to proscribe an investment made under these circumstances (R. 149), and that the action of the Commission was equivalent to retrospective legislation. (R. 150) The order of the Commission was therefore reversed. (R. 150)

SUMMARY OF ARGUMENT.

No rule of common law or equity has ever prohibited the purchase of stock by an officer or director, nor does any statute prohibit such purchase. When the purchases involved in these proceedings were made no regulation of the Commission indicated that the purchases might be objectionable to the Commission. Purchases of stock by officers and directors should generally be encouraged, whether or not the corporation is in process of reorganization. There was no unfairness or inequity in these particular purchases.

This case arises under the Public Utility Holding Company Act of 1935, and the jurisdiction of the Commission is predicated entirely thereon. The general provisions of Sections 7 and 11 thereof do not contain any reference to

such purchases. But Section 17 of that very statute does deal with purchases of stock by officers and directors. Section 17 provides for reports thereon to the Commission and for recovery by the corporation of profits made by such officers and directors from sales within six months of purchase. The absence of any further requirement, prohibition, or penalty in the statute dealing with the subject shows a Congressional intent to permit officers and directors to purchase and hold such stock freely to the extent that such purchases are not affected by the provisions of Section 17.

The order of the Commission approving a plan of reorganization containing a provision that the preferred stock purchased by the respondents should be treated on a less favorable basis than other preferred stock of the same class is unfair and inequitable to the persons affected and is detrimental to the interest of investors. The entry of such an order went beyond the power imposed in the Commission by Congress.

Only a legislature can adequately determine, after hearings on the subject, whether the prohibition established by Section 17 should be enlarged. The legislature would have to determine whether, in the absence of fraud or inequity, officers and directors should ever be precluded from purchasing stock, and if so when—whether during reorganization, pending reorganization, or always—whether such a prohibition should apply also to majority stockholders, and to members of families of officers, directors, or stockholders, whether such persons should also be prohibited from selling stock that they might own, or whether perhaps they should be required to sell all their stock in order that they might be completely disinterested.

Such legislative action obviously would be prospective in its operation. We submit that the Commission has invaded the legislative field and that its action was equivalent to an attempt to legislate retroactively.

ARGUMENT.

I.

No Rule of Common Law or Equity Prohibited the Purchase of Stock by the Respondents.

A. The Prevailing Doctrine in the Courts Imposes No Legal or Equitable Restriction on Purchases by an Officer or Director from a Shareholder.

An officer or director of a corporation may freely purchase the stock of his corporation from the stockholders, provided only that he is not guilty of fraud or misrepresentation. This is the law of Delaware, where the three corporations involved in this case were organized and pursuant to whose statutes the merger was conducted. *Cahall* v. *Lofland*, 12 Del. Ch. 299, 114 Atl. 224 (1921), aff'd 13 Del. Ch. 384, 118 Atl. 1 (1922); *Dupont* v. *Dupont*, 242 Fed. 98 (D. Del. 1917), 256 Fed. 129, (C. C. A. 3d, 1919), cert. denied, 250 U. S. 642 (1919). Such is the law in the great majority of jurisdictions in this country, and so it is in England and Canada. The authorities are collected in an annotation entitled *Duty of Officer or Director of Corporation Toward One from Whom He Purchases Stock*, 84 A. L. R. 615 (1933). See also 3 Fletcher on Corporations, Sec. 1168; Thompson on Corporations, Sec. 1258; 13 Am. Jur. 962.

The early authority is the case of *Carpenter* v. *Danforth*, 52 Barb. 581 (N. Y. 1868). Other leading decisions include *Bawden* v. *Taylor*, 254 Ill. 464, 98 N. E. 941 (1912); *Blabon* v. *Hay*, 269 Mass. 401, 169 N. E. 268 (1929); *Walsh* v. *Goulden*, 130 Mich. 531; 90 N. W. 406 (1902); *Dutton* v. *Barnes*, 162 Minn. 430, 203 N. W. 414 (1925); *Crowell* v. *Jackson*, 53 N. J. L. 656, 23 Atl. 426 (1891); *Klerlein* v. *Werner*, 307 Pa. 16, 160 Atl. 719 (1932); and *Percival* v. *Wright*, [1902] 2 Ch. 421.*

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*Other jurisdictions which deny the existence of any unusual duty on the part of a director in purchasing stock from a shareholder include Arizona, California, Indiana, Kentucky, Louisiana, Missouri, Rhode Island, Tennessee, Utah, Washington, and West Virginia. 84 A. L. R. 617-618.

The rule is succinctly stated in 3 Fletcher on Corporations, Sec. 1168:

> "By the weight of authority a director or officer has the same right to buy stock from a stockholder of the company as any one else."

As was said by the Illinois Court in *Bawden* v. *Taylor*, *supra*, at page 942:

> "* * * The officers * * * are trustees for the stockholders as a body with respect to the business and property of the corporation, which is under their control and management for the benefit of stockholders generally; but an officer has no control over the shares of the individual stockholder and is not a trustee for such stockholder with respect to his stock. *Officers of a corporation may purchase the stock of stockholders on the same terms and as freely as they might purchase of a stranger.*" (Italics ours.)

The italicized language was recently quoted with approval in *Anchor Realty & Investment Co.* v. *Rafferty*, 308 Ill. App. 484, 32 N. E. (2d) 394, 401 (1941). *Seitz* v. *Frey*, 152 Minn. 170, 188 N. W. 266 (1922), states the same doctrine:

> "* * * a director or officer does not stand in a fiduciary relation to a stockholder in respect to his stock, and *has the same right as any other stockholder to buy stock from or sell stock to another stockholder*". (Italics ours.)

Similar language could be multiplied many times.

It can be said categorically that no court has ever laid down a general restriction against the purchase of stock by officers and directors such as was contained in the opinion and order of the Commission in this case. The prevailing judicial doctrine imposes no restrictions on such transactions other than those ordinarily imposed by the law of torts.

B. The Same Rule Obtains in Suits by Minority Stockholders for the Benefit of the Corporation.

The rule that an officer or director may freely purchase stock in a corporation in the absence of fraud or other inequity obtains not only in suits brought directly by a stockholder vendor for his own benefit against an officer or director but also has been applied in cases where the contention has been made that a constructive trust in favor of the corporation should be imposed upon the stock purchased by officers and directors so that any profit therefrom should be turned over to the corporation, as urged by the Commission in this case.

An interesting case of this sort is *Bisbee* v. *Midland Linseed Products Company*, 19 F. (2d) 24 C. C. A. 8th (1927), cert. den. 275 U. S. 564 (1927). This decision affirmed a dismissal of a bill brought by minority stockholders praying that a constructive trust be imposed upon alleged wrongful profits made by the officers and directors of Midland. Midland was in liquidation. It had ceased business, and its only remaining function was to collect its assets and distribute them to the stockholders. In these circumstances some of its directors and officers organized a corporation which purchased large blocks of the outstanding stock. This was done for the purpose of minimizing the taxes of the participants. The stock so purchased ultimately developed a value considerably in excess of the purchase price, and the contention was made by the plaintiff stockholders that the purchases so made at the instance of the directors should be considered in trust for the corporation. It was held, however, that the directors were under no duty to account to the corporation for such profits, the court saying:

> "There can be no question but that the directors, officers, majority stockholders, and those in control of the liquidation of the Midland occupied towards the corporation and its stockholders, in respect to the business and property of the corporation, a fiduciary relation or sub modo trusteeship, and could not deal with the prop-

erty of the corporation for their own personal benefit or advantage. (citing cases.)

"Those in control of the liquidation of the Midland owed this duty to the company and the minority stockholders. But their duty as trustees with respect to the business and property of the corporation did not extend to the outstanding stock of the corporation, for the reason that such stock is the individual property of the respective stockholders, and is not in any sense property of the corporation. The corporation as such has no interest in the outstanding stock, or in dealings between the stockholders, with respect thereto. Each stockholder has the right to buy stock in the corporation, or to sell his stock as he sees fit, and no stockholder, nor group of stockholders, has any pecuniary interest in the stock of the others, and has no interest in any gain or loss that may be realized or sustained by such others in dealing with or disposing of their stock. *No trust duty rests upon the directors, officers, majority stockholders, or liquidators of a corporation, in behalf of any other stockholders or set of stockholders, with respect to dealings between them in buying or selling stock in the corporation, unless some situation exists which makes it inequitable for such officer to buy the stock in question.* (citing cases)" (Italics ours).

Respondents maintain that no court of equity would decree in a suit by the stockholders of Federal that the respondents should be held trustees ex maleficio of the stock purchased and therefore liable to turn it over to the corporation, since there has been no showing of fraud, concealment or any unfairness to either the body of the stockholders, or the corporation.

C. The Only Dissent from the Prevailing Doctrine Has Been Directed Toward Its Failure to Impose a Duty of Disclosure on the Director.

Dissent from the prevailing doctrine has centered solely on the issue of whether or not an officer or director is under a duty to disclose to the seller information known to the

officer or director but not known to the stockholder who is about to sell his shares. A few courts purport to require that the director inform the seller of important information affecting the value of the corporation's shares of which the stockholder is ignorant. *Oliver* v. *Oliver*, 118 Ga. 362, 45 S. E. 232 (1903); *Stewart* v. *Harris*, 69 Kans. 498, 77 Pac. 277 (1904).

These few states hold that in the absence of disclosure of relevant important information the stockholder who sold may have an accounting to recover any profit which accrued to the purchasing director. This minority rule—requiring disclosure—has been rejected by all the important financial states. But even this rule does not prohibit purchases, it merely requires disclosure.

What has sometimes been considered a third view, referred to as the "special facts" doctrine, originated with the case of *Strong* v. *Repide*, 213 U. S. 419 (1909). This doctrine is that although ordinarily a director is under no duty to disclose information to the stockholder from whom he is purchasing the stock, it may be that because of unusual circumstances surrounding the transaction the director must make a full disclosure. Again it must be emphasized that the point under consideration is whether or not there is a duty of disclosure; in no case has there been a suggestion that there is a duty to refrain from purchasing if there has been no failure to disclose. Actually every case classified under the "special facts" doctrine may be explained on the basis of traditional legal principles, such as govern cases of fraud, misrepresentation, etc. Thus, it was recently stated in *Fischer* v. *Guaranty Trust Co.*, 259 App. Div. 176, 18 N. Y. S. (2nd) 328, 333 (1940):

> "* * * I believe it will be found that in every instance where a director has been held accountable to the stockholder, in an action arising out of negotiations resulting in the purchase of his stock, not only the element of active fraud of the director existed, but the reliance of the stockholder thereon as the inducement to part with the stock also existed."

D. Respondents Have Withheld No Information Which Should Have Been Disclosed.

The facts in reference to the purchases have been given in this brief at page six, and will not be repeated. Wide publicity was given to the financial condition of the company and the development of the successive plans.

There has been no contention by the Commission that there was a failure to disclose any circumstance which would have affected the value of the stock. The Commission's decision was based squarely on the assumption that there should be an "inflexible rule" that officers and directors of a corporation may not purchase its stock while a reorganization plan is pending. The Commission stated,

> "* * * honesty, full disclosure and purchase at a fair price do not take the case outside the rule." (R. 73)

Respondents maintain that there has never been such an "inflexible rule", and that the Commission had no authority to promulgate such a rule in this case.

II.

Neither Section 7 Nor Section 11 of The Public Utility Holding Company Act of 1935 Empowers the Commission to Require the Respondents to Surrender Stock Purchased by Them While Reorganization Proceedings Were Pending.

Section 7(e) of the Public Utility Holding Company Act of 1935 makes it mandatory* upon the Commission to permit a declaration filed under Section 6 to become effective regarding the exercise of a privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security unless the Commis-

* Subject to requirements not here material.

sion finds that this will result in an unfair and inequitable distribution of voting power or

> "• • • is otherwise detrimental to the public interest or the interest of investors or consumers".

Section 11(e) of the Act has as one of its standards that the plan be

> "• • • fair and equitable to the persons affected • • •"

The majority of the Commission properly treated the case as arising under Section 7 (R. 118, 122), and merely remarked that the plan must also

> "be considered in the light of the standards of Section 11(e)". (R. 122)

This proceeding was thus under Section 7, but for the purposes of this case whatever difference there may be between "detrimental to the interest of investors" and "fair and equitable to the persons affected" appears immaterial. The respondents contend that for the Commission to treat the stock purchased by them during the period when the reorganization plan was pending on a different basis from other stock of the same class would be "detrimental to the interest of investors" under Section 7 and also would not be "fair and equitable to the persons affected by the plan" as contemplated by Section 11.

There is certainly nothing in the language of the statute which expressly gives the Commission power to treat stock purchased by officers and directors during a period when a reorganization plan is pending on a different basis from other stock of the same class. And it would seem that when the Commission deals with questions concerning rights and priorities of classes of stockholders, it should take those rights and priorities as they exist under state law. There is no other source for rights and priorities. *Erie Railroad* v. *Tompkins*, 304 U. S. 64 (1938). Heretofore, equality

of treatment among stockholders of the same class has been considered fundamental in any plan of reorganization under state law. A stockholder of a class is entitled to the same rights as any other stockholder of the same class. By the use of such general language as "detrimental to the interest of investors" and "fair and equitable to the persons affected", Congress surely did not intend to authorize the Commission to compel discrimination among holders of securities of a single class under a theory never heretofore applied.

Rights of stockholders may be modified by merger or consolidation, by reduction of capital, or by amendment to the corporate charter in various ways. Authority for such proceedings is found in the statutes of the state under which the particular corporation is organized and in the court decisions construing such statutes. There have been innumerable proceedings which have modified rights of stockholders, but we have found no decision where it has ever been held that while such proceedings are pending officers and directors may not purchase stock of the corporation, and we respectfully urge that there is no basis in principle or authority for an attempted distinction between a case involving a corporation in voluntary reorganization and a corporation for which no such reorganization is contemplated.

The fact that a registered public utility holding company is required to submit its plan to the Commission for a report and is required to file a declaration under Section 7 before the rights of its stockholders can be modified seems to afford even less basis for a rule prohibiting stock purchases by officers and directors than during a reorganization outside of the Act. The plan may not be submitted to the stockholders and no proxies may be solicited unless and until the Commission has permitted the declaration to become effective and has made a report on the plan, which report must be transmitted to all of the stockholders with any solicitation of assent. Finally the stockholders must

vote on the plan. There is no occasion for the promulgation of a new principle of corporate law to protect stockholders in such cases.

III.

Section 17 of the Public Utility Holding Company Act of 1935 Recognizes the Right of Respondents to Purchase Stock.

As we have shown, the courts have not restricted or prohibited the purchase of stock in a corporation by its officers and directors. The only qualification which need be made to this statement is that the courts of a few states have held that a director is under a duty to disclose to the selling shareholder any special information which the director has with reference to the value of the stock. The important financial legislation in the period from 1933 to 1935, however, imposed certain new requirements on directors of corporations listed on a stock exchange and on directors of public utility holding companies.

These restrictions are embodied in Section 16 of the Securities Exchange Act of 1934* and Section 17 of the Public Utility Holding Company Act of 1935. Section 16 of the 1934 Act, which is the counterpart of Section 17 of the 1935 Act, "* * * aroused great controversy", Tracy and MacChesney, *The Securities Exchange Act of 1934*, 32 Mich. L. Rev. 1025, 1056 (1934). Extended hearings were held on this portion of the Act. Throughout the discussion it was recognized that the proposed legislation would be an innovation. As one writer put it:

> "The Section has established for the management and those in control of the larger corporations of the United States a new standard of conduct far beyond that required by prior statutory or case law." Yourd, *Trading in Securities by Directors, Officers and Stock-*

* 48 Stat. 896, 15 U. S. C. Sec. 78(p).

holders: Section 16 of the Securities Exchange Act, 38 Mich. L. Rev. 133 (1939).

These sections, like other portions of the acts of which they are a part, impose on the management a definite duty of disclosure. Purchase of the stock of the company by its officers and directors must be reported to the Commission. Other sections provide for periodic financial reports and the disclosure of other information which might in the past have been used by directors or officers for their personal gain. See MacChesney and O'Brien, *Full Disclosure Under the Securities Act*, 4 Law and Contemporary Problems 143 (1937); MacChesney, *Further Developments in "Disclosure" Under the Securities Act*, 33 Ill. L. Rev. 145 (1939).

Section 17 of the Public Utility Holding Company Act of 1935 provides for forfeiture to the corporation of "any profit realized by any such officer or director from any purchase and sale, or any sale and purchase, of any security of such registered holding company or any subsidiary company thereof *within any period of less than six months*". The statute says that this is "for the purpose of preventing the unfair use of information which may have been obtained by any such officer or director by reason of his relationship to such registered holding company". In this section, Congress went beyond the imposition of a duty to disclose, and placed a definite and certain limitation on the right to profit from trading in the securities of the corporation.

The legislative history shows that Congress considered that, through the provisions of Section 16 of the 1934 Act and Section 17 of the 1935 Act, the purchase of securities by the management had been sufficiently regulated to eliminate the abuses indicated at the hearings. Thus, in Senate Report No. 792, 73rd Congress, page 9, with reference to what became Section 16 of the 1934 Act, the committee stated:

> "Such a provision will render difficult or impossible the kind of transactions which were frequently de-

scribed to the committee, where directors and large stockholders participated in pools trading in the stock of their own companies, with the benefit of advance information regarding an increase or resumption of dividends in some cases, and the passing of dividends in others."

Again, at page 20, with reference to the six-month provision, the report states that:

"The expressed purpose of this provision is to prevent the unfair use of inside information."

At page 68 of the Senate Report No. 1455, 73rd Congress, 2nd Session, the provisions of Section 16 are analyzed under the heading "Regulation of Market Activities of Officers, Directors and Principal Stockholders". This would seem to indicate that Section 16 expressed the full extent of Congress' intent to change the law with respect to purchase of stock by management.

At page 40 of Senate Report No. 621, 74th Congress, which is an analysis of the bill which became the Public Utility Holding Company Act of 1935, it is said:

"This section corresponds to section 16 of the Securities Exchange Act of 1934 and covers the transactions by officers, directors, and affiliates of registered holding companies in the securities of those companies and of subsidiary companies thereof."

From this legislative history it appears that Congress had no intention to create any other prohibition against or limitation on purchase of corporate securities by the officers and directors of a corporation. The proposition acquires further support in view of the cause of action given to the issuing corporation to recover any profits realized within a period of six months. It seems clear that Congress did not intend that profits from purchases by management should result to the corporation, except in those specified instances where the profit was realized within *six months* of the date of purchase. Yet the Commission is now attempting to re-

quire that management give up stock acquired during a period of two and a half years. Since the problem of purchases of securities by management was expressly covered by Section 17, well recognized tenets of statutory construction require that no further prohibition or limitation be read into the same statute through the generalities of Section 7 or Section 11. Crawford on Statutory Construction, Sec. 195 (1940).

As late as August 7, 1941, the Commission itself stated in its *Report on Proposals for Amendments to the Securities Act of 1933 and Exchange Act of 1934*, at page 82:

> "It is only where the insider makes a profit within the relatively short period of six months that his profit is required to be turned over to the corporation."

One commentator stated:

> "As long as equity securities are acquired for the purposes of investment or control, Section 16(b) is not concerned with the circumstances of the acquisition". Yourd, *Trading in Securities by Directors, Officers and Stockholders: Section 16 of the Securities Exchange Act*, 38 Mich. L. Rev. 133, 148 (1939).

The Public Utility Holding Company Act of 1935 is the *only* statute directly involved in this case. The entire jurisdiction of the Commission in regard to public utility holding companies is derived from that Act. The procedure for filng a declaration under Section 6, the action by the Commission under Section 7, and the effect of Section 11, is all determined by the same statute. And it is in *this same* statute that Section 17 provides that any profit realized by an officer or director by purchase and sale of its stock consummated within six months shall be forfeited to the corporation "for the purpose of preventing the unfair use of information which may have been obtained by any such officer or director by reason of his relationship to such registered holding company".

The Court need not go beyond this one statute. If Congress had wished to bring about the result requested by the Commission in this proceeding, a provision would have been included in the Public Utility Holding Company Act of 1935 that officers and directors who purchase stock while a plan is under consideration by the Commission shall be required to surrender such stock as a prerequisite to the approval of such a plan. But no such provision was included in the statute. As the Court of Appeals said:

> "Clearly, the enactment of Section 17 was intended to restrict a recognized existing right and place a definite and certain limitation on its exercise. But subject to its provisions, officers and directors of a corporation are permitted to deal in its securities." (R. 145)

IV.

The Authorities Cited on Behalf of the Commission do not Support a Restriction of the Right of Respondents to Purchase Stock.

The theory of the Commission was set forth as follows:

> "Corporate directors are fiduciaries * * * in the process of formulation of a 'voluntary' reorganization plan, the management of a corporation occupies a fiduciary position toward all of the security holders to be affected, */ * * A trustee may not 'become the purchaser of the property which he represents' or any portion of it though he has done so for a fair price without fraud at a public sale * * * accordingly, honesty, full disclosure and purchase at a fair price do not take the case outside the rule." (R. 72, 73)

The Commission stated that a trustee of an express trust is prohibited from purchasing the trust res "though he has done so at a fair price without fraud, at a public sale", and by "analogy" from certain cases arising under the bankruptcy laws, the Commission decided that the same rule should be applied in the case at bar. (R. 77)

By stating that "corporate directors are fiduciaries" the Commission does not greatly advance the argument. The question is: to whom do the directors owe an obligation, and what is the extent of that obligation.

> "Although it is often said that a director of a corporation occupies the position of a trustee with respect to the corporation, closer analysis shows that this is far from accurate. A trustee of an express trust may not ordinarily buy trust property; he may not sell to the trust estate any property he owns or in which he has a personal interest; nor may he borrow trust funds for his own purposes. On the other hand a director may either buy from or sell to the corporation, provided that he can prove the price is fair; in many instances, borrowing corporate funds is permissible. These departures from the norm of a trustee's conduct are not asserted as exceptions to his character as a trustee, but rather are put forth as ordinary instances of his duties and powers. Accordingly, while a director bears some relation to a trustee, it is impossible to base an accurate estimate of his powers, duties, or liabilities upon the tenuous theory that he is a 'trustee'." 39 Col. L. Rev. 219 (1939).

The Commission seeks support for its contention in *Pepper* v. *Litton*, 308 U. S. 295 (1939), *American Ins. Co.* v. *Avon Park*, 311 U. S. 138 (1940), and *Woods* v. *City Bank Co.*, 312 U. S. 262 (1941). The *Pepper* case involved a "planned and fraudulent scheme" by the dominant stockholder of a corporation to defraud other creditors in prosecuting an alleged claim for accrued salary. The *Avon Park* case involved a fiscal agent of a municipality who was also a creditor, and who had concealed this dual relationship from other creditors. In the *Woods* case, claimants who had represented conflicting interests were denied compensation. There is nothing in these decisions which modifies the well established rule that stock of a corporation may be purchased by its officers and directors.

These and the other cases cited by the Commission involve situations where there has been fraud, bribery, or other

inequity, or where the Court has applied provisions of the Bankruptcy Act not involved in this case.*

These provisions of the Bankruptcy Act obviously are not directly applicable to the present case, which arises under the Public Utility Holding Company Act of 1935. Furthermore, the situation in the present case is quite different. In cases arising under the Bankruptcy Act the agent, attorney, trustee, or committee acts by virtue of an express authorization from the creditor or stockholder given in the case, and usually has broad and complete authority even to the point of voting finally on behalf of such creditor or stockholder. Here the officers and directors of the corporation bear no such relationship to the stockholders. They have not obtained from, nor can they solicit or obtain from, any stockholder a proxy or authorization. They act merely in their general capacity as officers and directors. As such they have no standing in the proceedings and take no direct part therein. The corporation proposes the plan.** It must

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* Fraud: *United States* v. *Buckner*, 108 F. (2d) 921, (C. C. A. 2d. 1940), cert. den. 309 U. S. 669 (1940); *Kroger* v. *Jaburg*, 231 App. Div. 641, 248 N. Y. S. 387 (1931); *Miner* v. *Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218 (1892); *Tower Hill-Connellsville Coke Co.* v. *Piedmont Coal Co.*, 64 F. (2d) 817 (C. C. A. 4th 1933), cert. den. 290 U. S. 675; *Wardell* v. *Railroad G.*, 103 U. S. 651 (1880). A bribe: *Lum* v. *McEwen*, 56 Minn. 278, 57 N. W. 662 (1894). Corporate officers and directors attempting to prove in full claims bought at discount when corporation was insolvent. *In Re Norcor Manufacturing Co.*, 109 F. (2d) 407, (C. C. A. 7th 1940); *In re McCrory Stores Corp.*, 12 F. Supp. 267, (S. D. N. Y. 1935). Bankruptcy Act applied: *Taylor* v. *Standard Gas and Electric Co.*, 306 U. S. 307 (1939); *Otis & Co.* v. *Insurance Bldg. Corp.*, 110 F. (2d) 333, (C. C. A. 1st 1940); *In re Mountain States Power Co.*, 118 F. (2d) 405, (C. C. A. 3d, 1941); *In re Republic Gas Corp.*, 35 F. Supp. 300, (S. D. N. Y. 1936), *In re Paramount Publix Corp.*, 12 F. Supp. 823 (S. D. N. Y. 1935).

** The theory of the Commission's brief is that "the management" proposes the plan as trustee for the stockholders. Section 7 of the Public Utility Holding Company Act of 1935, however, provides that the *corporation* propose the plan. The corporation, as in all cases, acts through its officers and such action is presumably authorized by the directors. But the fact that the directors have continued to exercise the duties of their office should not be held to

be approved by the Commission, and finally adopted by the stockholders.

As the Court of Appeals said:

> "... The difference between petitioners and a stockholders' committee created to protect its members in winding up or reorganizing an insolvent corporation is striking and obvious. Here, as to the purchases made by petitioners, there is no express trust in which petitioners are trustees, nor are petitioners agents of, nor do they speak for, the shareholders in the proceedings before the Commission. They merely propose the plan—as to which, of course, honesty and fair dealing must be shown—and in the present instance is admitted. The approval is for the Commission, and the confirmation is by act of the stockholders in accordance with State law and in which two-thirds must agree, with the right on the part of a dissenting stockholder to have an appraisement and the value of his shares in cash. The directors' functions are thus wholly different from those of the reorganization committees, to which the courts apply the rule of trustee and beneficiary." (R. 147, 148)

V.

The Commission Has Attempted to Invade The Legislative Field.

As we have pointed out in this brief, the law has always been that officers and directors of a corporation may freely purchase its stock. The only difference in the decisions has been in the extent to which the courts require disclosure to the seller of particular facts known to the officers or directors.

The *legislature* has changed this law in two respects, by providing in Section 17 of the Public Utility Holding Com-

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impose a fiduciary relationship between directors and stockholders never before recognized and not created by any authorization from the stockholders to the directors in the particular case.

pany Act of 1935, that officers and directors shall report their holdings, purchases and sales, and that they shall account to the corporation for any profits made upon sales within six months of purchase. So far has the legislature changed the common law that officers and directors of a corporation may purchase its stock, and no further. If there is to be any further prohibition it should again be made by the legislature.

Of course, if a case involves fraud or actual inequity the courts can always resolve the question fairly in view of the particular facts. This is what was done in the many cases cited on the petitioners' brief. But in a case where there has been full disclosure and complete compliance with the statute in reporting the purchases, and where there is no fraudulent element whatever, how are the courts to determine, in the absence of legislation, what the standard is to be?*

Shall officers and directors hereafter be precluded from purchasing stock at all? Or shall they be precluded only when a plan or reorganization is under consideration by the Commission? Or shall the prohibition extend to the period when the filing of a plan of reorganization may have been under consideration by the officers and directors?

Shall the prohibition apply to officers and directors only? Or to stockholders, and if so to what stockholders? Shall the prohibition apply to wives or members of the families of directors, officers, or stockholders, and if so in what degree of relationship?

Shall the prohibition apply to corporations in which officers or directors own stock? Or to corporations in which members of the families of officers or directors own stock?**

Shall officers or directors be prohibited from selling any stock that they already own? If they are to be precluded

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* Congress might just as logically have made the period in Section 17 five or seven months instead of six months.

** Respondent Chenery Corporation is, of course, not an officer or director.

from buying because they have information, perhaps they should be precluded from selling. Or, in addition to prohibiting them from purchasing additional stock, shall officers and directors be required to sell *all* their stock so that their actions thereafter will be completely disinterested?

A corporate officer or director almost invariably is better acquainted with the financial status of the corporation than are other stockholders. He can predict more accurately the possible future trends of corporate profits. He can usually tell better than anyone else when it is best to buy or when it is best to sell the stock of the corporation. All of these considerations might suggest a flat prohibition of purchase of stock by the management of a corporation, although there is less reason for prohibiting such purchases while proceedings are pending before the Commission, with the publicity incident thereto, than when the corporation is quietly engaged in the normal conduct of its affairs.

On the other hand, there are equally obvious reasons for permitting, and indeed, encouraging, the participation in ownership of a corporation by its management. The very desire for personal gain should lead to a more conscientious and energetic prosecution of corporate affairs. The fact that the management is in the same class as other shareholders would tend to lead to a fairer treatment of these other shareholders. Additional examples are readily apparent. "It is a common statutory provision that the directors must be share holders in the corporation", 83 U. Pa. L. Rev. 56, 57 (1939). And in a very recent note in 54 Harv. L. Rev. 1191, 1196 (May 1941) it is stated that "Theoretically it is desirable that the management have a proprietary interest in the corporation." We respectfully submit that purchases of stock of officers and directors should generally be encouraged whether or not the corporation is in process of reorganization.

All of these arguments, pro and con, are such as should properly be addressed to a legislative body, in order that the public policy involved may be carefully weighed, and

that all parties concerned may be given notice of any proposed change in the law. Such arguments actually were presented to Congress at the time of the enactment of the Public Utility Holding Company Act of 1935 and the Securities Exchange Act of 1934, and as a result, Congress reached a compromise position between complete freedom for management to purchase shares and complete prohibition. This compromise is set forth in Section 17 of the Public Utility Holding Company Act.

Any action by the legislature is prospective in its operation. Section 17 did not apply to transactions completed prior to the enactment of the statute. But here, without warning, the Commission suddenly attempted to promulgate a rule which would have deprived the petitioners of their ownership in stock which they had purchased when there had been no suggestion from any quarter that their conduct might be criticized.

Certainly no one could have advised the respondents, during the period from November 8, 1937, to June 29, 1940, during which the plans of merger and reorganization to eliminate the capital deficit were before the Commission, that they might not purchase shares of the company. No advance warning of the unprecedented decision of the Commission was given. Throughout this period the members of the staff of the Commission were fully cognizant of these purchases, yet no suggestion was made until the Commission's tentative opinion of June 29, 1940, that purchasing the preferred stock of the company was in any respect opposed to the standards laid down by Congress and the courts. For an administrative body to formulate a new principle and then to apply it retroactively to transactions which had been reported to that body and which had not been objected to is a harsh procedure.

This point was summarized by the Court of Appeals (R. 149) as follows:

> "In expressing this opinion, we are not saying that the Commission's view is not directed to a desirable

end. As to that, opinions of men of experience and probity and judgment will differ widely. But, if the Commission's objective is to be attained, it should be only after the pros and cons have been carefully weighed in their relation, respectively, to the dangers and the benefits, and the scales should be controlled by Congress and not by the Commission. In short, all that we hold is that this vital question of policy is one for the Congress and not for the Commission. Until Congress acts to change the standard it has expressly set up in the Act, action by the Commission to expand or enlarge its terms, and to make such expansion or enlargement apply to transactions three years old, is we think, with great deference to the Commission, neither more nor less than retrospective legislation."

CONCLUSION.

The respondents therefore pray that the judgment of the United States Court of Appeals for the District of Columbia be affirmed.

Respectfully submitted,

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APPENDIX.

Public Utility Holding Company Act of 1935.*

Sec. 6. (a) Except in accordance with a declaration effective under section 7 and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company.

* * *

Sec. 7. (a) A registered holding company or subsidiary company thereof may file a declaration with the Commission, regarding any of the acts enumerated in subsection (a) of section 6, * * *.

* * *

(d) If the requirements of subsections (c) and (g) are satisfied,** the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

* * *

(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers.

(e) If the requirements of subsection (g) are satisfied,** the Commission shall permit a declaration to become effective regarding the exercise of a privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security unless the Commission finds that such exercise of such privilege or right will result in an unfair or inequitable distribution of voting power among holders of the securities of the declarant or is otherwise detrimental to the public interest or the interest of investors or consumers.

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* 49 Stat. 803, 15 U. S. C. Sec. 79.

** Subsection (c) and (g) are not material.

Sec. 11(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

* * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

* * *

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in

accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

* * *

Sec. 17. (a) Every person who is an officer or director of a registered holding company shall file with the Commission in such form as the Commission shall prescribe (1) at the time of the registration of such holding company, or within ten days after such person becomes an officer or director, a statement of the securities of such registered holding company or any subsidiary company thereof of which he is, directly or indirectly, the beneficial owner, and (2) within ten days after the close of each calendar month thereafter, if there has been any change in such ownership during such month, a statement of such ownership as of the close of such calendar month and of the changes in such ownership that have occurred during such calendar month.

(b) For the purpose of preventing the unfair use of information which may have been obtained by any such officer or director by reason of his relationship to such registered holding company or any subsidiary company thereof, any profit realized by any such officer or director from any purchase and sale, or any sale and purchase, of any security of such registered holding company or any subsidiary company thereof within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the holding company or subsidiary company in respect of the security of which such profit was realized, irrespective of any intention on the part of such officer or director in entering into such transaction to hold the security purchased or not to repurchase the security sold for a period of more than six months.